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Family Court, Seneca County, In re Kaufman

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SEARCH AND SEIZURE

U.S. CONST. amend. IV:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.Y. CONST. art. I, § 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons to be seized.

FAMILY COURT, SENECA COUNTY

In the Matter of Kaufman[1]
(decided February 17, 2000)

Respondent Craig T. Kaufman, a juvenile, was charged with a number of offenses which, if committed by an adult, would constitute the crimes of rape in the first degree, burglary in the first degree, sexual abuse in the first degree, unlawful imprisonment, menacing in the second degree and endangering the welfare of a child.[2] In the instant juvenile delinquency proceeding, respondent filed a motion to suppress certain physical evidence obtained pursuant to a search warrant as well as any evidence derived as a result of the search.[3] Respondent alleged that the underlying written search warrant application was deficient in that it was neither subscribed nor sworn in compliance with the applicable provisions of the Federal[4] and New York State Constitutions[5] and

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[1] 183 Misc. 2d 581, 706 N.Y.S.2d 589 (Fam. Ct. 2000).
[2] *Id.* at 581-82, 706 N.Y.S.2d at 589.
[3] *Id.* at 582, 706 N.Y.S.2d at 589.
[4] U.S. CONST. amend. IV. The Fourth Amendment provides:

the New York State Criminal Procedure Law.[6] The Family Court, Seneca County, granted respondent's motion to suppress the evidence, holding that the purported administration of the oath by a Sheriff's Department sergeant, who was neither a notary public nor otherwise authorized to administer oaths was ineffectual and accordingly the written search warrant application failed to conform to the constitutional and statutory requirements.[7]

The proffered evidence was seized pursuant to a search warrant which was issued on a written application dated August 31, 1999.[8] The application was submitted and signed by an investigating officer.[9] Following the applicant's signature, the application bore the notation "Subscribed and Sworn to before me the 31st day of August 1999."[10] The notation was followed by the signature of a sheriff's department sergeant.[11] The sergeant signatory who reputedly administered the oath was not a notary public and was not otherwise authorized to administer oaths.[12]

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[5] N.Y. CONST. art. I, § 12. This section provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons to be seized.

Id.

[6] N.Y. CRIM. PROC. LAW § 690.35(1) (McKinney 1995). Section 690.35(1) provides, in relevant part: "An application for a search warrant may be in writing or oral. If in writing, it must be made, subscribed and sworn to by a public servant specified in subsection one of section 690.05." *Id.*

[7] *Kaufman*, 183 Misc. 2d at 583, 706 N.Y.S.2d at 590.

[8] *Id.* at 582, 706 N.Y.S.2d at 589.

[9] *Id.*, 706 N.Y.S.2d at 589-90.

[10] *Id.*, 706 N.Y.S.2d at 589.

[11] *Kaufman,* 183 Misc. 2d at 582, 706 N.Y.S.2d at 589.

[12] *Id.*

In support of its argument for the adequacy of the oath at issue, the presentment agency relied on a number of New York cases which illustrate the flexibility permitted in the form of an oath.[13] In particular, the agency cited *People v. Wilson*,[14] *People v. Brown*,[15] and *People v. Zimmer*,[16] for the proposition that an oath is sufficient, regardless of form, so long as it is calculated to awaken the conscience and impress the mind of the person taking it in accordance with his or her religious or ethical beliefs.[17] The agency submitted that the oath here met this standard, since it was the investigating officer's belief that he was taking an oath before a

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[13] *Id.*, 706 N.Y.S.2d at 589-90.

[14] People v. Wilson, 255 A.D.2d 612, 679 N.Y.S.2d 732 (App. Div. 3d Dep't 1998). In *Wilson*, defendant appealed a conviction for several sex-related crimes arguing, *inter alia*, that the testimony of a seven year old victim was unsworn in light of the County Court's failure to administer a formal, traditional oath. *Id.* at 613, 679 N.Y.S.2d at 733. The lower court had engaged in an extensive colloquy with the young victim during which the victim unequivocally expressed her understanding of the obligation to tell the truth and the consequences for failing to do so. *Id.* The Appellate Division rejected defendant's argument, holding that this colloquy satisfied the requirements of an oath and allowed the victim to provide sworn testimony. *Id.*

[15] People v. Brown, 40 N.Y.2d 183, 352 N.E.2d 545, 386 N.Y.S.2d 359 (1976). In *Brown*, defendant appealed a conviction for criminal possession of a dangerous drug arguing, *inter alia*, that a search warrant application failed to comply with statutory requirements. *Id.* at 185, 352 N.E.2d at 546, 386 N.Y.S.2d at 360. The application had been presented orally to a Bronx County Supreme Court Justice by a police officer whose statements were recorded by a court reporter. *Id.* The New York State Court of Appeals held that the search warrant application was valid, finding that the application procedure used substantially, albeit not literally, complied with the statutory requirements. *Id.* at 185-86, 352 N.E.2d at 546, 386 N.Y.S.2d at 360.

[16] People v. Zimmer, 112 A.D.2d 500, 490 N.Y.S.2d 912 (3d Dep't 1985). In *Zimmer*, defendant appealed a conviction for criminal possession of a weapon arguing, *inter alia*, that the search warrant, pursuant to which a search of defendant's car trunk was conducted, was invalid. *Id.* at 500-01, 490 N.Y.S.2d at 913. The issuing magistrate had neglected to sign the jurat on the search warrant application, however the magistrate subsequently testified that the police officer applicant had orally sworn to the application. *Id.* The Appellate Division, Third Department found that the magistrate's failure to sign the jurat was cured by his subsequent unequivocal testimony and thus the statutory procedure for issuance of the search warrant was sufficiently followed. *Id.* at 501, 490 N.Y.S.2d at 913.

[17] *Kaufman*, 183 Misc. 2d at 582, 706 N.Y.S.2d at 589-90.

duly authorized person, despite the fact that the sergeant was not in actuality authorized to administer oaths.[18]

The Family Court began its analysis by pointing out that courts are entitled to some degree of discretion when conducting a review of search warrant procedures.[19] The court noted that substantial, not literal, compliance with statutory requirements is sufficient.[20] The court acknowledged that the presentment agency's argument had some merit and agreed that neither the applicable statute,[21] nor the Federal[22] or State Constitutions[23] prescribed any particular form or procedure to be used in the administration of the required oath or affirmation.[24] However, the Court declined to extend the flexibility permitted in the form and administration of the oath to the requirement that the oath supporting a search warrant application be administered by a person authorized by law to do so.[25]

In the instant case, the sergeant who reputedly administered the oath was not a notary public[26] and although police officers are authorized by statute to administer oaths under certain circumstances,[27] no analogous statutory provision exists with

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[18] *Id.*, 706 N.Y.S.2d at 590.

[19] *Id.*

[20] *Id.*

[21] N.Y. CRIM. PROC. LAW § 690.35(1) (McKinney 1995). Section 690.35(1) provides, in relevant part: "An application for a search warrant may be in writing or oral. If in writing, it must be made, subscribed and sworn to by a public servant specified in subsection one of section 690.05." *Id.*

[22] U.S. CONST. amend. IV.

[23] N.Y. CONST. art. I, § 12.

[24] *Kaufman*, 183 Misc. 2d at 582-83, 706 N.Y.S.2d at 590.

[25] *Id.* at 583, 706 N.Y.S.2d at 590.

[26] *Id.* at 582, 706 N.Y.S.2d at 590.

[27] *See e.g.* N.Y. CRIM. PROC. LAW §100.30(1) (McKinney 1992). Section 100.30(1) provides, in relevant part: "An information, a misdemeanor complaint, a felony complaint, a supporting deposition, and proof of service of a supporting deposition may be . . . sworn to before a desk officer in charge at a police station or police headquarters or any of his superior officers." *Id.*
See also N.Y. VEH. & TRAF. LAW § 208 (McKinney 1996). Section 208 provides, in relevant part:

> Where a traffic summons has been served by a police officer . . . any chief, deputy chief, captain, lieutenant or acting lieutenant, or sergeant or acting sergeant of a police department . . . is hereby authorized to administer to such

respect to search warrant applications.[28] Citing *People v. Polle*,[29] the court stated that the authority to administer oaths should not be construed in the absence of express statutory authorization.[30] The court concluded that regardless of the applicant's intent or belief, the fact that the sergeant who purportedly administered the oath lacked authority to do so rendered the oath without effect.[31] Accordingly, respondent's motion to suppress all evidence seized pursuant to and in connection with the warrant was granted.[32]

The Federal[33] and New York State Constitutions[34] are essentially identical in relevant part and both require that search warrants be supported by an oath or affirmation. New York courts typically hold that these constitutional requirements allow for a degree of flexibility in both the form and manner of administration of oaths in general.[35] With respect to the requirement that the oath

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> police officer . . . all necessary oaths in connection with the execution of the complaint to be presented in court by such police officer.

Id.

[28] *Kaufman*, 183 Misc. 2d at 583, 706 N.Y.S.2d at 590.

[29] 9 N.Y.2d 349, 174 N.E.2d 474, 214 N.Y.S.2d 369 (1961). In *Polle*, defendant appealed his conviction for a misdemeanor traffic violation for which the underlying information was sworn before a Sheriff's Department sergeant who was not a notary public. *Id.* at 350, 174 N.E.2d at 474, 214 N.Y.S.2d at 369. The applicable statute (the predecessor of § 208 of the Vehicle and Traffic Law) authorized the sergeant to administer oaths only when a traffic summons had been served and the arresting officer testified that no such summons had been served. *Id.* at 350, 174 N.E.2d 474, 214 N.Y.S. 2d 369-70. The New York Court of Appeals reversed the conviction and granted defendant's motion to dismiss the information, declining the State's suggestion to reject the literal meaning of the statute. *Id.* at 350-51, 174 N.E.2d at 474-75, 214 N.Y.S.2d at 370.

[30] *Kaufman*, 183 Misc. 2d at 583, 706 N.Y.S.2d at 590.

[31] *Id.*

[32] *Id.*

[33] U.S. CONST. amend. IV.

[34] N.Y. CONST. art. I, § 12.

[35] *Kaufman*, 183 Misc. 2d at 583, 706 N.Y.S.2d at 590. *See also,* United States v. Turner, 558 F.2d 46 (2d Cir. 1977). In *Turner*, the United States Court of Appeals for the Second Circuit reversed a district court order suppressing evidence relating to defendant's alleged smuggling of an unapproved drug. *Id.* at 53. The oath supporting the search warrant was sworn over the telephone and the judge's name was signed by a federal customs agent involved in the investigation. *Id.* at 48-49. The appellate court rejected defendant's argument

or affirmation supporting a search warrant application be administered by a person authorized to do so, however, New York courts appear to require strict compliance and will infer no such authority absent an express statutory provision.[36]

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that the telephonic oath underlying the search warrant was constitutionally invalid, finding that the Fourth Amendment was sufficiently flexible to account for such technological advances in the form of an oath or affirmation. *Id.* at 50.

[36] *Kaufman*, 183 Misc. 2d at 583, 706 N.Y.S.2d at 590.